SUPREME COURT, U.S.
FILED
OCT 3 1958
JAMES R. BROWNING, Clerk

No. 334

In the Supreme Court of the United States

OCTOBER TERM, 1958

SCIENTIFIC LIVING, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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CITATIONS

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In re Bradley, 318 U. S. 50 — 6

McComb v. *Jacksonville Paper Co.*, 336 U. S. 187 — 6

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Tileston v. *Ullman*, 318 U. S. 44 — 5

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Statute:

Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, Section 9 — 2

Miscellaneous:

3 Freeman, *Judgments*, § 1294 (5th ed. 1925) — 7

7 Moore's Federal Practice (2d ed.) — 9

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QUESTION PRESENTED

Whether the court below correctly upheld a district court order fining petitioner $3,000 for civil contempt.

STATUTE INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, provides in pertinent part as follows:

> That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy

or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered; or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Third Circuit affirming a district court order fining petitioner $3,000 for civil contempt because of petitioner's refusal to comply with a subpoena *duces tecum*.

On September 25, 1953, the Federal Trade Commission issued an order directing petitioner, a corporation which sells and distributes in interstate commerce health foods and a cooking utensil, to cease and desist from making certain misrepresentations as to the curative and health properties of its products. During a subsequent investigation to determine whether petitioner was complying with the order, the Commission issued a subpoena *duces tecum* requiring the production of designated documents. Petitioner refused to comply with the subpoena, and on April 17, 1957, the District Court for the Middle District of Pennsylvania, on motion of the Commission, issued an order enforcing the subpoena (App. 6b).[1] Petitioner appealed from this order to the Court of Appeals for the Third Circuit, and the District Court stayed fur-

[1] "App." refers to the appendix to the Commission's brief in the Court of Appeals.

ther proceedings "until [petitioner] has had an opportunity to complete its appeal," and provided that "[a] time and place for compliance will be fixed when the appeal in the matter herein involved has been disposed of" (App. 6b).

On August 12, 1957, the Court of Appeals dismissed petitioner's appeal for want of timely prosecution, and two days later, the District Court received the mandate of the Court of Appeals (App. 2b). On September 25, 1957, the District Court fixed a new date (October 8, 1957) for compliance with the subpoena (App. 7b). The documents were not produced on that date, and the court then directed petitioner to appear and show cause why it should not be held in contempt for failing to comply with the court's order. After a hearing, the District Court, on October 22, 1957, adjudged petitioner in civil contempt and fined it $3,000 "to be effective on October 28, 1957, in the event that said corporation fails to comply before" that date with the production order.[3] When petitioner again failed to comply, the court on October 29, 1957, entered judgment for $3,000 (App. 8b–9b).

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[2] On August 19, 1957, the Court of Appeals denied a motion to vacate the order dismissing the appeal; and on October 7, 1957, it denied a motion to recall and stay its mandate. On February 3, 1958, this Court denied a petition for certiorari seeking review of the Court of Appeals' dismissal of the appeal. 355 U. S. 940.

[3] At the same hearing, the court held the corporation's secretary, Basalyga, and its vice-president, Mildred Hohensee, in civil contempt (Transcript of Hearing, October 22, 1957, pp. 37–38). Basalyga was committed at once (*id.*, p. 38), and Mrs. Hohensee on December 17, 1957 (Pet. 2). Both were released on January 9, 1958 (Pet. 14).

On May 6, 1958, the Court of Appeals unanimously affirmed (Pet. Ex. A). In a brief *per curiam* opinion, it stated (*ibid.*) that "Upon consideration of the record we are of the opinion that the instant appeal is without merit."

ARGUMENT

Although petitioner makes numerous unsupported charges of misconduct by Government officials (see, *e. g.*, Pet. 3, 5–6, 15–20, Ex. Q), these contentions are irrelevant to the narrow issue here presented: whether the Court of Appeals correctly affirmed petitioner's $3,000 fine for civil contempt.[1] We submit that the decision of the Court of Appeals on that issue was clearly correct, and that the petition presents no question warranting further review by this Court.

1. Petitioner contends (Pet. 11–12) that the District Court's order of October 29, 1957, was "'void" because it imposed a "flat" fine which, it contends, cannot be imposed for civil contempt because it is "non-coercive." But the October 29 order must be considered in connection with the prior order of October 22 and, when thus viewed, it clearly was coercive. The October 22 order adjudged petitioner in civil contempt and fined it $3,000, "to be effective on October 28, 1957, in the event that said corporation fails to comply before said date with this Court's Order" en-

[1] Two of petitioner's officers were also held in civil contempt (see note 3, *supra*). They were not parties to the appeal below, and are not petitioners. Petitioner's contentions that their rights were violated (*e. g.*, Pet. 3, 6, 15–20) are, therefore, not material to the issue which petitioner presents. Cf. *Tileston* v. *Ullman*, 318 U. S. 44.

forcing the subpoena. The October 29 order, after reciting that the documents had not been produced, merely directed the clerk to enter judgment against petitioner for $3,000.

"One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty," and the fine is a "coercive sanction * * * to compel the contemnor to do what the law made it his duty to do." *Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585, 590. The procedure followed by the District Court in this case is identical with that adopted by this Court in *United States* v. *United Mine Workers*, 330 U. S. 258. There this Court, in modifying the District Court's single fine for both criminal and civil contempt, imposed a fine of $700,000 for criminal contempt, and an additional fine of $2,800,000 unless the union should show within five days that it had fully complied with the court order which it had violated (p. 305). The Court pointed out (p. 307) that the latter fine was "a coercive imposition upon the defendant union to compel obedience with the court's outstanding order." See also *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–444; *Fox* v. *Capital Co.*, 299 U. S. 105; *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187.[5]

[5] The other cases cited by petitioner (Pet. 12) are beside the point. *In re Bradley*, 318 U. S. 50, involved punishment on a criminal contempt charge of intimidating a witness. Although *Nilva* v. *United States*, 352 U. S. 385, holds only that failure to produce subpoenaed records is punishable as a criminal contempt, the decision does not deny that it might also constitute a civil contempt. *Doyle* v. *London Guarantee and Accident Co.*, 204 U. S. 599, held only that a civil contempt order during the progress of a case is interlocutory and not immediately reviewable.

Also without substance is the contention (Pet. 11) that the fine is void because the October 29 order was entered without notice or hearing. The previous order of October 22, 1957, which imposed the fine but conditioned it upon the non-production of the subpoenaed documents, was entered after full hearing. The October 29 order merely recited the undisputed fact that the documents were not produced, and directed entry of judgment against petitioner for $3,000. It no more required notice and hearing than the entry of a default judgment upon motion of the plaintiff after the non-appearance of the defendant. 3 Freeman, *Judgments*, § 1291 (5th ed. 1925), and cases there cited.

Petitioner's contention (Pet. 8–11, 14–15) that the evidence does not support its being held in contempt is frivolous. Between September 25, 1957, when petitioner was ordered to produce the documents, and October 28, 1957, when the fine became effective, petitioner had more than a month in which to comply with the order or to offer some reasonable explanation why the documents were not forthcoming. Since petitioner and its officers refused to comply, and since, at the hearing on October 22, 1957, they gave no satisfactory reason for not producing the documents, the District Court was fully justified in taking decisive measures to compel obedience, by imposing the $3,000 fine to become effective six days later if petitioner had not by that date produced the documents.

Petitioner also complains that it was without counsel at the October 22, 1957 hearing (Pet. 4–8). One of petitioner's counsel had withdrawn "several weeks ago" and had so informed petitioner at the time (Transcript of Hearing, October 22, 1957, p. 14); another

attorney (who had appeared only to request a continuance of the enforcement proceedings, *id.*, 2–4), was permitted to withdraw from the case without objection from petitioner (*id.*, p. 4). Although petitioner unsuccessfully sought an attorney before the present proceedings (*id.*, p. 14), petitioner did not request additional time to seek new counsel, but instead came prepared for the hearing. Both the vice-president and the secretary personally drafted and filed lengthy motions challenging on several grounds the jurisdiction of the court to proceed with the case (*id.*, pp. 25–26, 27–28). The District Court was, therefore, fully justified in not staying, on its own motion, proceedings which had been already unnecessarily protracted by petitioner's dilatory tactics.[6]

2. Petitioner further contends that the District Court lost jurisdiction to enter the contempt orders when it issued a stay on April 29, 1957, in connection with the prior appeal in this case (Pet. 12–13). That order suspended further proceedings "until [petitioner] has had an opportunity to complete its appeal," and ordered the case resumed "when the appeal in the matter herein involved has been disposed of" (App. 6b). When the Court of Appeals dismissed the appeal on August 22, 1957, the appeal was "complete," and the mandate which was received two days later authorized the District Court to go forward with the case. Since the stay order was limited to the period of the "appeal," and since the mandate of the Court

[6] Petitioner also alleges bias on the part of the trial judge (Pet. 8–11), but an examination of the transcript of the October 22, 1957 hearing shows that this contention, based chiefly on isolated excerpts from that transcript, is without substance.

of Appeals issued at the termination of the appeal to that court was not stayed,[7] the stay did not continue until expiration of the period during which a petition for a writ of certiorari could be filed. See *Powell* v. *Maryland Trust Co.*, 125 F. 2d 260, 273 (C. A. 4), certiorari denied, 316 U. S. 671; 7 Moore's Federal Practice, p. 1371 (2d ed.).[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] On September 30, 1957, petitioner moved to recall and stay the mandate pending this Court's action on the petition for certiorari, but the Court of Appeals denied the motion on October 7, 1957. On January 4, 1958, Mr. Justice Brennan denied a similar application.

[8] The cases cited on page 13 of the petition hold only that, once the appellate court acquires jurisdiction of the case, the District Court cannot vacate or modify the judgment appealed from, or the order staying execution of the judgment. In this case, however, the Court of Appeals had relinquished its jurisdiction when it issued its mandate to the District Court.

U. S. GOVERNMENT PRINTING OFFICE: 1958